APPENDIX A

In re P.S., a Minor (The People of the State of Illinois, Appellant, v. P.S., Appellee).

The People of the State of Illinois, Appellant,
v.
John Kimery, Appellee.
The People of the State of Illinois, Appellant,
v.
Roderick Turner, Appellee.
Nos. 78910, 78944.
Supreme Court of Illinois.
Jan. 18, 1996.

Justice Miller delivered the opinion of the court:

The sole question presented in these consolidated appeals is whether the constitutional guarantees against double jeopardy prohibit a criminal prosecution following a civil forfeiture judgment based on the same conduct. (U.S. Const., amend. V; Ill. Const. 1970, art. I, §10.) Although this court rejected a similar claim in *People* v. *1988 Mercury Cougar* (1992), 154 Ill.2d 27, the appellate court concluded that a contrary conclusion was mandated by recent United States Supreme Court decisions. (See *Department of Revenue* v. *Kurth Ranch* (1994), 511 U.S. __, 128 L.Ed.2d 767, 114 S.Ct. 1937; *Austin* v. *United States* (1993), 509 U.S. __, 125 L.Ed.2d 488, 113 S.Ct. 2801.) In resolving the issue on appeal, we are therefore called upon to reconsider our decision in *1988 Mercury Cougar* in light of these recent Supreme Court decisions.

Defendants, P.S., a minor, John Kimery, and Roderick Turner, were each charged by complaint and/or indictment in the circuit court of Kane County with violations

of the Illinois Controlled Substances Act (Controlled Substances Act) (720 ILCS 570/100 *et seq.* (West 1992) (formerly Ill.Rev.Stat.1991, ch. 56 1/2, par. 1100 *et seq.*)) or the Cannabis Control Act (720 ILCS 550/1 *et seq.* (West 1992) (formerly Ill.Rev.Stat.1991, ch. 56 1/2, par. 701 *et seq.*)). In conjunction with defendants' arrest on these charges, police seized cash and/or an automobile, and the State subsequently sought forfeiture of these items under the Controlled Substances Act (720 ILCS 570/505 (West 1992)) or the Cannabis Control Act (720 ILCS 550/12 (West 1992)), and the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (725 ILCS 150/1 *et seq.* (West 1992) (formerly Ill.Rev.Stat.1991, ch. 56 1/2, par. 1671 *et seq.*)). In each case, the trial judge ordered the property forfeited. Defendants then moved to dismiss the criminal charges against them on double jeopardy grounds. The motions to dismiss were denied.

On appeal, the appellate court found that the civil forfeitures constituted punishment for double jeopardy purposes and that the forfeiture proceedings were separate from the criminal proceedings. The appellate court therefore concluded that further prosecution of defendants for the same offense that resulted in the prior forfeitures was barred by double jeopardy. Consequently, all criminal charges against defendants were dismissed. See 269 Ill.App.3d 907; Nos. 2-93-1050, 2-93-1212 cons. (unpublished order under Supreme Court Rule 23).

We granted the State's separate petitions for leave to appeal in cause Nos. 78910 and 78944 and consolidated the causes on appeal for purposes of argument and disposition. (145 Ill.2d R. 315(a).) We also granted leave to the Cook County State's Attorney to submit a brief as *amicus curiae* on behalf of the State. (134 Ill.2d R. 345.)

For the reasons that follow, we affirm in part and reverse in part the judgment of the appellate court in cause No. 78910 and reverse the judgment of the appellate court in cause No. 78944.

BACKGROUND

Cause No. 78944

The substantive facts in each case are undisputed and may be briefly summarized. Because the appellate court in the cases of P.S. and Kimery cited the appellate court's decision in Turner's case, we will begin by first reviewing the facts in Turner's case.

In No. 78944, defendant Turner, on January 5, 1993, was charged by indictment in the circuit court of Kane County with unlawful possession of a controlled substance (720 ILCS 570/402(a)(2) (West 1992)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2) (West 1992)), and unlawful possession of a controlled substance without a tax stamp (35 ILCS 520/10 (West 1992)). The indictment against Turner resulted from the execution of a search warrant on Tuner's residence on December 10, 1992. During the execution of the search warrant, police seized cocaine and $2,165 in cash.

On December 23, 1992, before Turner was indicted, the State initiated an administrative forfeiture action against the $2,165 found in the search of Turner's home. (See 725 ILCS 150/6(A) (West 1992).) Turner thereafter filed a verified claim and cost bond with the Kane County State's Attorney, asserting his interest in the cash seized and requesting its return. (See 725 ILCS 150/6(C) (West 1992).) Because Turner contested the forfeiture,

the State then instituted a judicial *in rem* forfeiture suit against the cash under the Controlled Substances Act (720 ILCS 570/505(a)(5) (West 1992)) and the Forfeiture Act (725 ILCS 150/7(1) (West 1992)). The forfeiture complaint alleged that the cash seized was subject to forfeiture because it was furnished or intended to be furnished in exchange for a substance in violation of the Controlled Substances Act or represented the proceeds of such an exchange. 720 ILCS 570/505(a)(5) (West 1992); 725 ILCS 150/7(1) (West 1992).

On August 20, 1993, a hearing was held in the forfeiture case. Following the hearing, the trial judge ordered the cash forfeited to the State. No appeal was taken from the forfeiture order.

On September 30, 1993, Turner moved to dismiss the pending criminal indictment against him on double jeopardy grounds. In the motion, Turner alleged that the actions forming the basis for the criminal proceeding were the same actions underlying the forfeiture proceeding. Citing *Austin*, Turner also alleged that the civil forfeiture of the cash constituted punishment for double jeopardy purposes. In light of the forfeiture, Turner contended that a subsequent criminal prosecution for the same offense that resulted in the forfeiture would violate the double jeopardy clauses of the United States and Illinois Constitutions (U.S. Const., amend. V; Ill. Const. 1970, art. I, §10). On January 13, 1994, the trial judge denied the motion to dismiss.

On appeal, the appellate court concluded that the State's attempt to criminally prosecute Turner following the judicial forfeiture of the $2,165 violated the constitutional prohibition against double jeopardy. In reaching this conclusion, the court reviewed the Supreme Court's

decisions in *United States* v. *Halper* (1989), 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892, *Austin*, *Kurth Ranch*, and the United States Court of Appeals for the Ninth Circuit's decision in *United States* v. *$405,089.23 United States Currency* (9th Cir.1994), 33 F.3d 1210, *petition for cert. filed* (U.S. August 28, 1995), No. 95-346, 64 U.S.L.W. 3289. Relying primarily on these decisions, the appellate court concluded that the forfeiture of the cash constituted punishment for double jeopardy purposes. (269 Ill.App.3d at 915.) The appellate court acknowledged that its decision conflicted with this court's decision in *1988 Mercury Cougar*, but reasoned that it was compelled to reach the opposite conclusion in light of *Austin* and *Kurth Ranch*, which were decided after this court's decision in *1988 Mercury Cougar*. (269 Ill.App.3d at 915.) This court in *1988 Mercury Cougar* held that the civil forfeiture of property following a criminal proceeding based on the same offense did not constitute a second punishment for double jeopardy purposes. (*1988 Mercury Cougar*, 154 Ill.2d at 37.) The appellate court also determined that the forfeiture proceeding was separate from the criminal proceeding. In doing so, the court rejected the State's argument that the civil and criminal actions were part of a single, coordinated prosecution of Turner. (269 Ill.App.3d at 916-18.) The appellate court vacated the trial judge's order denying Tuner's motion to dismiss and dismissed with prejudice the criminal charges against him. We thereafter granted the State's petition for leave to appeal. 145 Ill.2d R. 315(a).

Cause No. 78910

In No. 78910, defendant P.S. was charged by complaint in the circuit court of Kane County on May 4, 1991, with

unlawful possession of cannabis (Ill.Rev.Stat.1991, ch. 56 1/2, par. 704(d)) and unlawful possession of cannabis with intent to deliver (Ill.Rev.Stat.1991, ch. 56 1/2, par. 705(d)). P.S. was also charged by indictment for these same offenses on July 21, 1992. The criminal charges against P.S. stemmed from the execution of a search warrant on May 3, 1991, against P.S.'s car, person, and residence. The search resulted in the seizure of numerous items, including cannabis, drug paraphernalia, a 1982 Cadillac Eldorado, and $1,627.22 in cash.

On September 3, 1991, while the criminal charges were pending against P.S., the State sought forfeiture of the cash under the Cannabis Control Act (Ill.Rev.Stat.1991, ch. 56 1/2, par. 712) and the Forfeiture Act (Ill.Rev.Stat. 1991, ch. 56 1/2, par. 1679). The amended complaint for forfeiture alleged that the cash was in close proximity to forfeitable substances and drug paraphernalia and therefore was itself subject to forfeiture. (Ill.Rev.Stat.1991, ch. 56 1/2, pars. 712, 1677.) In response to the forfeiture complaint, P.S. claimed to be the owner of the currency, but contended that the currency was not intended nor had it been used for any narcotics or controlled substance related purpose. P.S. therefore averred that the money was not subject to forfeiture. Following a bench trial in the forfeiture action on August 31, 1992, the trial judge found that the $1,627.22 was subject to forfeiture (see Ill. Rev.Stat.1991, ch. 56 1/2, par. 712(a)(5)) and ordered the cash forfeited to the State. No appeal was taken from this order.

On February 3, 1993, the criminal charges against P.S. were transferred to the juvenile court for adjudication. (See 720 ILCS 550/7(b) (West 1992).) The State then filed a petition for adjudication, requesting that the trial judge

find P.S. delinquent based on the charges. P.S. subsequently moved to dismiss the criminal charges against him or, in the alternative, to stay the proceedings based on double jeopardy grounds. In the motion, P.S. contended that he had already been punished for his conduct as a result of the forfeiture of the cash and therefore could not be prosecuted for the same conduct in the juvenile proceeding without violating the double jeopardy clauses of the United States and Illinois Constitutions (U.S. Const., amend. V; Ill. Const.1970, art. I, §10).

On September 1, 1993, the motion was denied. P.S. then appealed the denial of his motion to the appellate court. The appellate court stayed the proceedings in the trial court pending resolution of the appeal. Relying primarily on *Austin*, *Kurth Ranch*, and *United States Currency*, the appellate court found that the forfeiture of the cash constituted punishment for double jeopardy purposes. The court further determined that the forfeiture proceeding was separate from the criminal proceeding, rather than being part of a single, coordinated prosecution of P.S. The court therefore vacated the trial judge's order denying P.S.'s motion to dismiss and dismissed with prejudice the delinquency petition. (Nos. 2-93-1050, 2-93-1212 cons. (unpublished order under Supreme Court Rule 23).) The court also noted that its recent decision in *People* v. *Towns* (1995), 269 Ill.App.3d 907, provided further support for its decision here.

Also, in No. 78910, defendant Kimery was charged by indictment in the circuit court of Kane county on October 22, 1991, with unlawful possession of a controlled substance (Ill.Rev.Stat.1991, ch. 56 1/2, par. 1402(c)). The charge stemmed from an alleged incident that occurred on October 6, 1991, which resulted in the seizure of Kimery's automobile.

On November 18, 1991, while the above charge was pending against Kimery, the State filed an *in rem* forfeiture action against Kimery's vehicle, a 1982 Maroon Ford Mustang (Ill.Rev.Stat.1991, ch. 56 1/2, pars. 1505(a)(3), 1679). The forfeiture complaint alleged that on October 6, 1991, police observed Kimery, the driver of the subject vehicle, stop the vehicle and speak to two males, one of whom was identified as Larry Harris. After speaking with Kimery, the two men proceeded to enter a nearby building and then return to Kimery's car. Kimery then unlocked the passenger door and allowed Harris to enter the vehicle. The police next observed Kimery receive a small, white bag from Harris in exchange for two bills of United States currency. Following this transaction, officers conducted a stop of Kimery and Harris and recovered a plastic bag, later identified as containing cocaine, from Kimery. The complaint further alleged that Kimery was the registered owner of the vehicle and that the vehicle was subject to forfeiture because it was used to facilitate the sale, receipt, possession, and concealment of a controlled substance (see Ill.Rev.Stat.1991, ch. 56 1/2, par. 1505(a)(3)).

Kimery subsequently appeared as owner-claimant in the forfeiture proceeding, seeking return of the vehicle. In Kimery's second-amended answer to the forfeiture complaint, he admitted that he was the owner of the car, but denied that it was used to facilitate the alleged drug transaction. Kimery therefore contended that the vehicle was not subject to forfeiture and requested its return. Following a bench trial on May 26, 1992, the vehicle was ordered forfeited to the State. The order was affirmed on appeal to the appellate court. See *People* v. *One 1982 Maroon Ford Mustang* (1994), 258 Ill.App.3d 127.

On August 13, 1992, Kimery moved to dismiss the criminal charge against him on double jeopardy grounds. The motion was taken under advisement pending this court's decision in *1988 Mercury Cougar*. On April 12, 1993, defendant entered a plea of guilty. Prior to sentencing, Kimery moved to withdraw his guilty plea and dismiss the charges or, in the alternative, to stay sentencing. Relying in part on *Austin*, Kimery argued that the forfeiture of the car constituted punishment for double jeopardy purposes and therefore any further punishment for the same offense that resulted in the forfeiture was barred by double jeopardy. The trial judge denied Kimery's motion and sentenced him to one year's imprisonment. Execution of the sentence was stayed pending appeal.

On appeal, the appellate court consolidated Kimery's appeal with P.S.'s appeal for purposes of disposition only. As in P.S.'s case, the appellate court concluded that criminally prosecuting Kimery following the forfeiture of his automobile violated the double jeopardy clause. Accordingly, the appellate court vacated Kimery's conviction and sentence and dismissed with prejudice the criminal charges against him. (Nos. 2-93-1050, 2-93-1212 cons. (unpublished order under Supreme Court Rule 23).) We granted the State's petition for leave to appeal in cause No. 78910 and consolidated it with the State's appeal in cause No. 78944. 145 Ill.2d R. 315(a).

DISCUSSION

On appeal to this court, the State argues that the appellate court erred in finding that the double jeopardy clause barred the criminal prosecution of defendants fol-

lowing a civil asset forfeiture based on the same conduct that resulted in the forfeiture.

The double jeopardy clause of the fifth amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., amend.V.) Protections against double jeopardy are similarly guaranteed by the Illinois Constitution of 1970, which provides that "[n]o person shall be * * * twice put in jeopardy for the same offense." (Ill. Const.1970, art. I, §10.) In raising their constitutional claims in the trial court, defendants relied on both the Federal and State Constitutions. Neither the State nor the defendants have argued, however, that a double jeopardy analysis under the State constitution should differ from an analysis under the Federal Constitution. (See *People* v. *Levin* (1993), 157 Ill. 2d 138, 160 (finding no indication that the double jeopardy clause of the Illinois constitution was intended to be construed differently than the Federal provision).) We therefore analyze the State's argument here only under the double jeopardy clause of the fifth amendment to the Federal Constitution.

The constitutional prohibition against double jeopardy safeguards against three distinct abuses: (1) a second prosecution after acquittal; (2) a second prosecution after conviction; and (3) multiple punishments for the same offense. (*Kurth Ranch*, 511 U.S. at __ n. 1, 128 L.Ed.2d at 773 n. 1, 114 S.Ct. at 1941 n. 1; *Schiro* v. *Farley* (1994), 510 U.S. __, __, 127 L.Ed.2d 47, 56, 114 S.Ct. 783, 789; *Halper*, 490 U.S. at 440, 104 L.Ed.2d at 496, 109 S.Ct. at 1897; *North Carolina* v. *Pearce* (1969), 395 U.S. 711, 717, 23 L.Ed.2d 656, 664-65, 89 S.Ct. 2072, 2076; see also *Levin*, 157 Ill.2d at 144; *Rehg* v. *Illinois*

Department of Revenue (1992), 152 Ill.2d 504, 521.) It is the third of these protections-the bar against multiple punishments-that is the subject of this appeal. The multiple-punishment prong of the double jeopardy clause protects against the State's seeking multiple punishments for the same offense in separate proceedings. (*Helvering* v. *Mitchell* (1938), 303 U.S. 391, 399, 82 L.Ed. 917, 922, 58 S.Ct. 630, 633.) It does not, however, prohibit the State from seeking multiple punishments in the same proceeding or trial, provided that the total punishment does not exceed that authorized by the legislature. *Halper*, 490 U.S. at 450, 104 L.Ed.2d at 503, 109 S.Ct. at 1903; *Kurth Ranch*, 511 U.S. at __, 128 L.Ed.2d at 778, 114 S.Ct. at 1945; *Missouri* v. *Hunter* (1983), 459 U.S. 359, 368-69, 74 L.Ed.2d 535, 543-44, 103 S.Ct. 673, 679.

To determine whether the State has violated the defendants' constitutional protections against double jeopardy here, we must make three key determinations: (1) whether the civil forfeitures in the instant cases constitute "punishment" for double jeopardy purposes; (2) whether the civil forfeitures and criminal prosecutions constitute punishment for the same offenses; and (3) whether the civil forfeitures and criminal prosecutions are separate proceedings. All three questions must be answered in the affirmative for double jeopardy to apply. *United States* v. *Ursery* (6th Cir.1995), 59 F.3d 568, 571, *petition for cert filed* (U.S. August 28, 1995), No. 95-345, 64 U.S.L.W. 3289.

1. Separate Offenses

To prevail on a double jeopardy challenge, a defendant must establish not only the existence of two punish-

ments, but also that he has been punished twice for the same offense. (U.S. Const., amend. V; Ill. Const.1970, art. I, §10.) *Amicus curiae* argues that the civil forfeitures and the criminal charges here do not constitute punishment for the same offenses because the forfeitures require proof that the property subject to forfeiture was involved in the commission of a crime, while the criminal charges require proof that defendants committed the crimes. Therefore, *amicus* contends that each offense requires an element the other does not and, consequently, the forfeitures and the criminal prosecutions cannot be considered punishments for the same offenses. *Amicus* also argues with regard to defendants Turner and P.S. that the proceeds which were the subject of the forfeitures in their respective cases were the result of a different violation from the one the defendants were charged with here. Consequently, *amicus* contends that the forfeitures and the criminal charges could not constitute punishment for the same offenses.

We note that neither the State nor the defendants have raised an issue regarding whether the forfeitures and the criminal prosecutions are punishment for the same offenses, although the State did discuss *amicus'* argument during oral argument before this court. We therefore would be justified in not considering the issue raised by *amicus*. (See *People* v. *P.H.* (1991), 145 Ill.2d 209, 234; *Archer Daniels Midland Co.* v. *Industrial Comm'n* (1990), 138 Ill.2d 107, 117.) However, because the issue is dispositive with respect to defendants Turner and P.S., we choose to address the question at this time. (*Cf. Teague* v. *Lane* (1989), 489 U.S. 288, 103 L.Ed.2d 334, 109 S.Ct. 1060 (addressing the issue of retroactivity although issue was raised only by *amicus* brief); see generally *Ursery*, 59

F.3d at 573-74; (addressing whether the civil forfeiture and criminal charges constituted punishment for the same offense); *United States* v. *One 1978 Piper Cherokee Aircraft, Tail No. 5538V, Including Its Tools & Appurtenances* (9th Cir.1994), 37 F.3d 489; *United States* v. *Sherret* (D.Ore.1995), 877 F.Supp. 519; *Crowder* v. *United States* (M.D.N.C.1994), 874 F.Supp. 700; *Quinones-Ruiz* v. *United States* (S.D.Cal.1994), 873 F.Supp. 359; *Houston* v. *Mile High Adventist Academy* (D.Co. 1994), 872 F Supp. 829; *United States* v. *McCaslin* (W.D. Wash.1994), 863 F.Supp. 1299.

In the context of multiple punishments, the Supreme Court has held that the double jeopardy bar applies if the two offenses for which the defendant is punished or tried violate the "same-elements" test. (*United States* v. *Dixon* (1993), 509 U.S. __, __, 125 L.Ed.2d 556, 568, 113 S.Ct. 2849, 2856, citing *Blockburger* v. *United States* (1932), 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180.) The "same-elements" test, commonly referred to as the *Blockburger* test, focuses on "whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment." (*Dixon*, 509 U.S at __, 125 L.Ed.2d at 568, 113 S.Ct. at 2856; *People* v. *Carrillo* (1995), 164 Ill.2d 144, 147.) Under *Blockburger* and its progeny, if a lesser included offense has been charged, the greater offense cannot subsequently be charged without violating the double jeopardy clause. (*Dixon*, 509 U.S. at __, 125 L.Ed.2d at 569, 113 S.Ct. at 2857; see also *Harris* v. *Oklahoma* (1977), 433 U.S. 682, 682, 53 L.Ed.2d 1054, 1056, 97 S.Ct. 2912, 2913; *Carrillo*, 164 Ill.2d at 147-48.) Under the *Blockburger* test, then, whether the forfeitures and the criminal prosecutions constitute punishment for the

same offenses depends on a comparison of the forfeiture allegations and the criminal charges.

In cause No. 78944, defendant Turner was charged with unlawful possession of a controlled substance (720 ILCS 570/402(a)(2) (West 1992)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2) (West 1992)), and unlawful possession of a controlled substance without a tax stamp (35 ILCS 520/10 (West 1992)). To support a conviction for unlawful possession of a controlled substance, the State must establish that Turner had knowledge of the substance's presence and that Turner had actual or constructive possession of the substance. (720 ILCS 570/402(a)(2) (West 1992).) In order to convict defendant of unlawful possession of a controlled substance with intent to deliver, the State must establish that defendant had the intent to deliver the controlled substance in addition to the above elements of unlawful possession. (720 ILCS 570/401 (a)(2) (West 1992).) For the final charge against Turner, the State would have to establish that Turner was a "dealer," that he possessed a controlled substance, and that he failed to affix the required tax stamp to the controlled substance. (35 ILCS 520/10 (West 1992).) In comparison, the State sought forfeiture of the cash because it was alleged to have been furnished or was intended to have been furnished in exchange for a substance in violation of the Controlled Substances Act or represented the proceeds of such an exchange. (720 ILCS 570/505(a)(5) (West 1992); 725 ILCS 150/7(1) (West 1992).) To establish the basis for the forfeiture, the State relied on the presumption that currency found in close proximity to forfeitable substances was furnished or intended to be furnished in exchange for a substance in

violation of the Controlled Substances Act or represented the proceeds of such an exchange. In making the determination that the cash was subject to forfeiture, the trial judge stated that the cash was the product of illegal activity.

The elements involved in the forfeiture of the cash in Turner's case are clearly distinguishable from the elements the State must prove to convict Turner of the offenses charged. None of the elements necessary to establish forfeiture of the cash are included in the elements needed to establish the three offenses Turner was charged with committing. Therefore, the forfeiture and the criminal prosecution against Turner would not be punishment for the same offense, and the State should be allowed to proceed on the criminal indictment against Turner. Moreover, we note that there is no factual link between the cash as proceeds of a drug transaction and the criminal offenses. The cash was seized during the execution of a search that resulted in the seizure of cocaine which, in turn, was the basis for the above charges being brought against Turner. The cash could not have been traced to the proceeds of any sale of any of the cocaine found in the indictment since defendant is charged with possession of that cocaine, which had not yet been sold. See *United States* v. *Leaniz* (S.D.Ohio March 31, 1995), No. CR-2-90-18; see also 1 D. Smith, Prosecution & Defense of Forfeiture Cases §12.10(3), at 12-157 (1995); *United States* v. *1181 Waldorf Drive, St. Louis, Missouri* (E.D.Mo.1995), 900 F.Supp. 1167, 1173.

A similar result is reached in cause No. 78910 with respect to P.S. Defendant P.S. was charged with unlawful possession of cannabis (Ill.Rev.Stat.1991, ch. 56 1/2, par. 704(d)) and unlawful possession of cannabis with

intent to deliver (Ill.Rev.Stat.1991, ch. 56 1/2, par. 705(d)). The State sought forfeiture of $1,627.22 on the basis that it was in close proximity to forfeitable substances and drug paraphernalia. The proximity of the cash to forfeitable substances gives rise to the presumption that it was furnished or intended to be furnished in exchange for a substance in violation of the Cannabis Control Act, or was the proceeds of such an exchange, and therefore forfeitable under the Forfeiture Act. (Ill. Rev.Stat.1991, ch. 56 1/2, pars.712, 1677.) The charged offenses and the forfeiture proceedings each require proof of different elements. Therefore, the charges against P.S. are based on offenses that are distinct from the forfeiture. The forfeiture of the cash consequently does not present a bar to P.S's trial on the criminal charges, and the State should be allowed to proceed with the charges against P.S.

A different result is reached with respect to Kimery, however. Kimery was charged with unlawful possession of a controlled substance. (Ill.Rev.Stat.1991, ch. 56 1/2, par. 1402(c).) The State sought forfeiture of his automobile, contending it was used to facilitate the sale, receipt, possession and concealment of a controlled substance possessed in violation of the Controlled Substances Act. (Ill.Rev.Stat.1991, ch. 56 1/2, par. 1505(a)(3).) Any forfeiture under section 505(a)(3) of the Controlled Substances Act, therefore, requires proof of a criminal offense under the Controlled Substances Act. Thus, the State could not confiscate Kimery's vehicle without a showing that he possessed a controlled substance. The criminal offense is therefore subsumed by the forfeiture statute and does not require proof of an element that is not required by the forfeiture action.

(*Ursery*, 59 F.3d at 574; see also *One 1978 Piper Cherokee Aircraft*, 37 F.3d at 495; *United States* v. *Tilley* (5th Cir.1994), 18 F.3d 295, 297-98; *Oakes* v. *United States* (E.D.Wash.1994), 872 F.Supp. 817, 824; *McCaslin*, 863 F.Supp. at 1303.) The only difference between the forfeiture and criminal proceedings is the remedy sought. We therefore find that the civil forfeiture and the criminal conviction are punishments for the same offense in Kimery's case. To accept *amicus curiae's* argument that the proceedings in Kimery's case involve different elements because one deals with property and the other with people would be in essence to adopt a circular or illusory theory. (See *Oakes*, 872 F.Supp. at 824.) Moreover, the Supreme Court in *Austin* would seem to have set aside the legal fiction that the property, rather than the owner, is the offender. *Austin*, 509 U.S. at __, 125 L.Ed.2d at 501, 113 S.Ct. at 2808; see also *McCaslin*, 863 F.Supp. 1299; *Tilley*, 18 F.3d at 297; *United States* v. *One Parcel of Real Estate Located at Rural Route 9, LaHarp, Illinois* (C.D.Ill.1995), 900 F.Supp. 1032, 1037.

Because the double jeopardy clause is not implicated in the cases of Turner or P.S., the remainder of our discussion regarding double jeopardy will be limited solely to defendant Kimery.

2. Punishment

The Supreme Court has long recognized that double jeopardy does not preclude the imposition of both a criminal and a civil sanction with respect to the same act or omission, provided that the civil sanction does not constitute punishment for double jeopardy purposes. (See *Helvering*, 303 U.S. at 398-99, 82 L.Ed. at 921, 58 S.Ct.

at 633; *United States ex rel. Marcus* v. *Hess* (1943), 317 U.S. 537, 548-52, 87 L.Ed. 443, 451-54, 63 S.Ct. 379, 386-88; *One Lot Emerald Cut Stones* v. *United States* (1972), 409 U.S. 232, 235-37, 34 L.Ed.2d 438, 442-43, 93 S.Ct. 489, 492-93; *United States* v. *One Assortment of 89 Firearms* (1984), 465 U.S. 354, 361-66, 79 L.Ed.2d 361, 367-71, 104 S.Ct. 1099, 1104-07.) In resolving the question presented in these appeals, we therefore need to determine whether the forfeiture proceedings in question constitute punishment within the meaning of the double jeopardy clause. Three recent United States Supreme Court opinions guide our analysis.

In *Halper*, the Court considered whether and under what circumstances a civil penalty may constitute "punishment" for double jeopardy purposes. (*Halper*, 490 U.S. at 436, 104 L.Ed.2d at 494, 109 S.Ct. at 1895.) In resolving the issue, the Court first stated that the labels "criminal" and "civil" were not controlling when determining whether a sanction constituted "punishment" for double jeopardy purposes. "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." (*Halper*, 490 U.S. at 447, 104 L.Ed.2d at 501, 109 S.Ct. at 1901.) The Court also noted that it was the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated. (*Halper*, 490 U.S. at 447 n. 7, 104 L.Ed.2d at 501 n. 7, 109 S.Ct. at 1901 n. 7.) Applying these principles, the Court determined that "a civil sanction that cannot fairly be said solely to serve a

remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." (*Halper*, 490 U.S. at 448, 104 L.Ed.2d at 502, 109 S.Ct. at 1902.) The Court therefore held that the double jeopardy clause barred a defendant who had already been punished from being subjected to an additional civil sanction to the extent that the second sanction could not be characterized as solely remedial but, rather, at least in part, as a deterrent or retribution. *Halper*, 490 U.S. at 448-49, 104 L.Ed.2d at 502, 109 S.Ct. at 1902.

The *Halper* Court then went on to announce a rule in cases, such as the one before it, where a fixed penalty provision subjects an offender to a disproportionate sanction when compared to the damages he has caused: "Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." (*Halper*, 490 U.S. at 449, 104 L.Ed.2d at 502, 109 S.Ct. at 1902.) The Court finally noted that its decision did not preclude the State from seeking the full range of civil penalties against a defendant who has previously not been punished for the same conduct nor did it preclude the imposition of the full range of civil and criminal penalties in the same proceeding. *Halper*, 490 U.S. at 450, 104 L.Ed.2d at 503, 109 S.Ct. at 1903.

Following the decision in *Halper*, the Supreme Court decided *Austin*. At issue in *Austin* was whether the

excessive fines clause of the eighth amendment applied to forfeitures for property under sections 881(a)(4) and (a)(7) of the Federal controlled substances forfeiture act. (21 U.S.C.A. ss 881(a)(4), (a)(7) (West 1981 & Supp. 1994).) These provisions provide for the forfeitures of, respectively, conveyances and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes. Because the eighth amendment limits the government's power to punish, the central question before the Court was whether statutory forfeitures under those provisions were punishment.

After tracing the historical development of civil forfeiture provisions, the Court observed that historically in rem forfeitures were understood at least in part as punishment. (*Austin*, 590 U.S. at __, 125 L.Ed.2d at 503, 113 S.Ct. at 2810.) The Court then considered whether forfeitures under sections 881(a)(4) and (a)(7) were properly considered punishment today. The Court found nothing in the provisions at issue or there legislative history that contradicted the historical understanding of forfeitures as punishment. "In light of the historical understanding of forfeiture as punishment, the clear focus of ss 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, [the Court] [could not] conclude that forfeiture under ss 881(a)(4) and (a)(7) serve[d] solely a remedial purpose." (*Austin*, 509 U.S. at __, 125 L.Ed.2d at 505, 113 S.Ct. at 2812.) The Court therefore stated that forfeiture under the provisions at issue constituted punishment. In reaching this determination, the Court rejected the government's arguments that the provisions at issue were remedial because (1) they removed the instruments of a drug transaction and

(2) the forfeited assets served to compensate the government for the costs of undertaking law enforcement activities. The Court also stated that even if the forfeiture did serve some remedial purpose, the government's argument still failed because a civil sanction that cannot be found to serve solely a remedial purpose constituted punishment. *Austin*, 509 U.S. at __, 125 L.Ed.2d at 505, 113 S.Ct. at 2812.

Finally, the Court in *Kurth Ranch* held that a tax on the possession of illegal drugs assessed after the imposition of a criminal penalty for the same conduct violated the double jeopardy clause. Citing *Halper* and *Austin*, the Court began by noting that criminal fines, civil penalties, civil forfeitures, and taxes all generate government revenues, impose fiscal burdens on individuals, deter certain behavior, and are subject to constitutional constraints. (*Kurth Ranch*, 511 U.S. at __, 128 L.Ed.2d at 778, 114 S.Ct. at 1945.) The Court recognized that taxes are generally motivated by revenue-raising rather than punitive purposes. The Court acknowledged, however, that at times a tax may lose its usual character and approach punishment. The Court characterized the tax statute at issue as punitive because of its unusual features and, thus, found the tax to be punishment for purposes of the double jeopardy clause. *Kurth Ranch*, 511 U.S. at __, 128 L.Ed.2d at 781, 114 S.Ct. at 1948.

Based on the above authority, we need to determine whether the forfeiture of Kimery's automobile served, in part, to punish him. If so, the forfeiture will be considered punishment for purposes of the double jeopardy clause. In light of *Austin* and *Kurth Ranch*, we find that the forfeiture of Kimery's car, sought under the provisions of the Forfeiture Act, constitute punishment for double jeopardy purposes.

A review of the Forfeiture Act establishes that it is patterned after the Federal statute and should be interpreted consistently with the Federal statute. Section 2 of the Forfeiture Act provides:

> "The General Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom." (725 ILCS 150/2 (West 1992).)

We know from *Austin* that forfeitures under sections 881(a)(4) and (a)(7) of the Federal controlled substances forfeiture act are considered punishment. The forfeiture of Kimery's car was brought under the provisions of the Forfeiture Act relating to forfeitures of vehicles used to facilitate the sale, receipt, possession, and concealment of a controlled substance. (Ill.Rev.Stat.1991, ch. 56 1/2, par. 1505(a)(3).) This provision is similar in all material aspects to section 881(a)(4) of the Federal forfeiture act. In fact, this court has previously noted the similarity between section 505(a)(3) of the Forfeiture Act and section 881(a)(4) of the Federal act. (See *1988 Mercury Cougar*, 154 Ill.2d at 33.) Because the legislature has mandated that the provisions of the Forfeiture Act be interpreted consistently with the Federal forfeiture act, we must conclude that the forfeiture of Kimery's car constituted punishment for double jeopardy purposes.

Like 21 U.S.C. §881 (1988), the objective of the Forfeiture Act is to deter criminal behavior. Section 2 of the

Forfeiture Act specifically states that the forfeiture of property used or intended to be used to facilitate the manufacture, sale transportation, distribution, possession or use of controlled substances will have a "significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State." (725 ILCS 150/2 (West 1992).) Moreover, application of the Forfeiture Act's provisions are not triggered unless there is a corresponding criminal violation. Additionally, both the Federal statute and the Forfeiture Act here provide defenses for innocent offenders or interest holders in the property forfeited. (See 21 U.S.C.A. §881(a)(4)(C) (West 1981 & Supp.1994); 725 ILCS 150/8 (West 1992).) The presence of the innocent-owner defense demonstrates the Forfeiture Act's focus on the culpability of the owner and further supports our finding that the forfeiture at issue constitutes punishment. Because of the similarities between the forfeiture provisions at issue in here and in *Austin*, we conclude that the forfeiture of Kimery's car constitutes punishment for double jeopardy purposes. Because of our disposition in the cases of P.S. and Turner, it is not necessary for us to decide whether forfeiture of proceeds of a drug transaction constitutes punishment for double jeopardy purposes.

The State attempts to avoid our conclusion that the forfeiture at issue constitutes punishment by raising several arguments, all of which we reject. First, the State argues that we should follow our decision in *1988 Mercury Cougar* which mandates a different result from what is reached here. The State also contends that neither *Austin* nor *Kurth Ranch* requires this court to deviate from *1988 Mercury Cougar*. In *1988 Mercury Cougar*, this court held that the double jeopardy clause

did not bar the government from bringing a civil action for forfeiture of an instrumentality of crime subsequent to a criminal conviction for the same offense. This court reasoned that the forfeiture of an instrumentality of a crime would not violate the double jeopardy clause because the sanction in a forfeiture proceeding is not imposed upon a person, but rather is directed at the property. Moreover, this court found that the forfeiture of an instrumentality of crime is always remedial. (*1988 Mercury Cougar*, 154 Ill.2d at 35.) While our decision in *1988 Mercury Cougar* may have been valid at the time, the Supreme Court's decisions in *Austin* and *Kurth Ranch* have invalidated this court's distinction for holding that civil forfeitures are not punishment. (See *Austin*, 509 U.S. at __ n. 9, 125 L.Ed.2d at 501 n. 9, 113 S.Ct. at 2808 n. 9 (noting that forfeiture proceedings historically have been understood as imposing punishment despite their *in rem* nature); see also *State* v. *1979 Cadillac Deville* (La.App.1994), 632 So.2d 1221, 1225 n. 3; *McCaslin*, 863 F.Supp. at 1302.) To the extent that *1988 Mercury Cougar* is inconsistent with the opinion in this case, it is overruled.

The State's attempt to distinguish *Austin* by arguing that *Austin* only applies in the eighth amendment context is also unpersuasive. In resolving whether the eighth amendment protections applied in that case, the *Austin* Court found it necessary to determine whether the forfeiture at issue constituted punishment. Only after making this determination did the Court then determine whether the eighth amendment protections applied. Moreover, *Austin* used the "solely remedial" test employed by *Halper*, a double jeopardy case, in resolving the issue before the Court. A fair reading of *Austin* is

that it resolves the "punishment" issue with respect to forfeitures for double jeopardy purposes. Moreover, the majority of courts from other jurisdictions have held that the *Austin* analysis applies in the fifth amendment context. See, e.g., *United States* v. *Baird* (3d Cir.1995), 63 F.3d 1213, 1216, *petition for cert. filed* (U.S. September 17, 1995), No. 95-630, 64 U.S.L.W. 3318; *Ursery*, 59 F.3d at 573; *1978 Piper Cherokee Aircraft*, 37 F.3d at 495; *United States Currency*, 33 F.3d at 1219; *Oakes*, 872 F.Supp. at 826; *McCaslin*, 863 F.Supp. at 1302; *1979 Cadillac Deville*, 632 So.2d at 1228; *Fant* v. *State* (Tex. Ct.App.1994), 881 S.W.2d 830, 834; *State* v. *Clark* (1994), 124 Wash.2d 90, 99-100, 875 P.2d 613, 617.

We also find that the State's argument that *Kurth Ranch* does not apply to the forfeiture proceedings because it involved a tax is equally unavailing. Although *Kurth Ranch* involved a tax on drugs, the decision provides guidance in dealing with double jeopardy questions in the civil forfeiture context. If the tax in *Kurth Ranch* could run afoul of the double jeopardy clause, then a civil forfeiture, which is readily characterized as a sanction for criminal conduct, might also run afoul of the clause.

Finally, the State argues that if this court determines that the forfeiture constituted punishment we need to apply the proportionality test of *Halper* to determine the fairness of the forfeiture. We do not believe, however, that such a test is applicable in the present case. *Austin* appears to have specifically rejected a case-by-case approach, opting for a more categorical approach to forfeitures of conveyances used to facilitate the transportation etc. of contraband. In *Austin*, the Supreme Court found that the "rational-relation" test of *Halper* was inapplicable in the forfeiture setting there, and instead

looked to the purpose behind the forfeiture statute itself. Further, *Austin* distinguished the civil sanction at issue in *Halper* from the forfeiture at issue before it by noting that "*Halper* involved a small, fixed-penalty provision, which 'in the ordinary case . . . can be said to do no more than make the Government whole.' " (*Austin*, 509 U.S. at __ n. 14, 125 L.Ed.2d at 505 n. 14, 113 S.Ct. at 2812 n. 14, quoting *Halper*, 490 U.S. at 449, 104 L.Ed.2d at 502, 109 S.Ct. at 1902.) In contrast, the Court in *Austin* found that the value of the conveyance and real property forfeitable under sections 881(a)(4) and (a)(7) varied so dramatically that any relationship between the government's actual costs and the amount of the sanction was merely coincidental. Moreover, *Halper* involved a civil penalty whose remedial purpose was to compensate the government for the fraudulent acts perpetrated on it, while the purpose of the forfeitures at issue in *Austin* was to remove an instrumentality of a drug transaction. The categorical approach of *Austin* therefore would appear to obviate the need for this court to compare the value of the forfeited property to the government's damages and costs in this case. See *People* v. *Perez* (5th Cir. November 21, 1995), No. 94-60788, slip op. at 6; but see *Johnson* v. *State* (Tex.Ct.App.1994), 882 S.W.2d 17, 19-20; *State* v. *Borromeo* (4th Cir.1993), 1 F.3d 219, 220-21.

3. Separate Proceedings

Because the double jeopardy clause prohibits punishing a defendant more than once in separate proceedings, we must also determine whether the civil forfeiture proceeding in the instant case was separate from the criminal proceeding initiated against Kimery. The State argues

that the forfeiture and criminal proceedings against Kimery were not separate, but rather were part of a single, coordinated prosecution of Kimery. As a result, the State contends that the double jeopardy clause was not violated. In support of its argument, the State cites *United States* v. *Millan* (2d Cir.1993), 2 F.3d 17, and *United States* v. *One Single Family Residence Located at 18755 North Bay Road, Miami* (11th Cir.1994), 13 F.3d 1493, each decided prior to *Kurth Ranch* and holding that civil forfeiture and criminal cases pursued as part of a coordinated effort amounted to a single proceeding for double jeopardy purposes.

The Supreme Court has made clear that the government may "seek[ ] and obtain [ ] both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding," provided that the total punishment does not exceed that authorized by the legislature. (*Halper*, 490 U.S. at 450, 104 L.Ed.2d at 503, 109 S.Ct. at 1903; see also *Missouri* v. *Hunter* (1983), 459 U.S. 359, 366, 74 L.Ed.2d 535, 542, 103 S.Ct. 673, 678.) Courts have employed varying approaches to determine when a civil forfeiture action and a parallel criminal prosecution can properly be considered components of a single proceeding so that the double jeopardy clause is not implicated. The courts have reached different results.

The Second and Eleventh Circuits have held that parallel criminal and civil forfeiture actions constitute a single proceeding which does not implicate double jeopardy concerns. (See *Millan*, 2 F.3d at 20-21; *One Single Family Residence*, 13 F.3d at 1499.) In deciding that parallel civil and criminal actions constitute a single proceeding, the Second Circuit in *Millan* relied on the following factors: (1) warrants for the civil seizures and

criminal arrests were issued on the same day, by the same judge, and were based on the same affidavit; (2) a stipulation entered into by the government and defendants included both the property seized in the civil forfeiture and named in the criminal indictment; (3) the forfeiture complaint incorporated the criminal indictment; and (4) the defendants were aware of the criminal charges against them when they entered into the stipulation. (*Millan*, 2 F.3d at 20.) In resolving the issue, the court also stated that it did not find dispositive the fact that the civil and criminal actions were filed separately with their own docket number, noting that under the Federal system civil and criminal suits had to be filed and docketed separately. "Therefore, courts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated." (*Millan*, 2 F.3d at 20.) The court further noted that one of the Supreme Court's concerns in *Halper* was that the government might act abusively in seeking a second punishment when it was dissatisfied with the punishment levied in the first action. The court in *Millan* noted, however, that such a concern was not present in that case because the civil and criminal actions were contemporaneous, not consecutive, and the parties were fully aware that the government intended to pursue all criminal and civil remedies against them regardless of the outcome of the proceeding. *Millan*, 2 F.3d at 20; accord *One Single Family Residence*, 13 F.3d at 1499 (relying in part on *Millan* in finding that the double jeopardy clause was not implicated when the government pursued simultaneous criminal and civil sanctions against a defendant within a single, coordinated prosecution); *United States* v. *Smith*

(N.D.Ala.1995), 874 F.Supp. 347, 350 (following *Single Family Residence*).

In contrast, other circuits have rejected the view expressed in *Millan* and have instead concluded that civil forfeiture actions and parallel criminal prosecutions constitute separate proceedings for double jeopardy purposes. (See *United States* v. *Torres* (7th Cir.1994), 28 F.3d 1463, 1465; *United States Currency*, 33 F.3d at 1216-18; see also Ursery, 59 F.3d at 575.) In reaching the above conclusion, the Ninth Circuit in *United States Currency* stated:

"We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same 'proceeding.' In ordinary legal parlance, such actions are often characterized as 'parallel proceedings,' but not as the 'same proceeding.' A forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time." (Emphasis in original.) (*United States Currency*, 33 F.3d at 1216.)

Although both proceedings resulted from the same violation of law, the court stated that it was unwilling to "whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution.' " *United States Currency*, 33 F.3d at 1217.

The apparent inconsistencies between the Ninth and Second Circuits' approaches may depend more on factual and procedural differences in the cases rather than a fundamental difference in double jeopardy analysis. How-

ever, the Ninth Circuit's rationale in *United States Currency* does suggest that parallel civil and criminal proceedings will always violate the double jeopardy clause (see *United States Currency*, 33 F.3d at 1216 ("A forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time" (emphasis in original)); see also *Ursery*, 59 F.3d at 575), while under the Second Circuit's approach, parallel proceedings, although literally separate, may under certain circumstances constitute a single proceeding for double jeopardy purposes. The Second Circuit's approach, however, may be undercut by *Kurth Ranch* in which the civil and criminal prosecutions were filed contemporaneously, but were considered separate proceedings by the Supreme Court. See *Kurth Ranch*, 511 U.S. at __ n. 21, 128 L.Ed.2d at 780 n. 21, 114 S.Ct. at 1947 n. 21 (remarking that the case involved separate sanctions imposed in successive proceedings); see also *McCaslin*, 863 F.Supp. at 1304; 1 D. Smith, Prosecution & Defenses of Forfeiture Cases §12.10, at 12-141 n. 33 (1995).

In the present case, we find that in so far as the existence of a "single coordinated proceeding" would satisfy the requirements of the double jeopardy clause, the facts in the present case fail to reveal such a single, coordinated proceeding. (*Ursery*, 59 F.3d at 575.) Here, the State brought and tried the civil forfeiture action completely separately from the criminal prosecution. The actions were initiated and docketed separately. The State sought to try the actions at different times and before different judges which resulted in separate judgments against defendant. The civil forfeiture complaint did not incorporate the criminal indictment, nor did it refer to

the indictment. Moreover, the cases were handled by different attorneys from the State's Attorney's office, and there is no indication in the record of any communication between the prosecuting authorities in the forfeiture and criminal cases. The only coinciding factor between the forfeiture and criminal proceedings was that they were based on the same offense. This factor alone, however, is insufficient to support a determination that the actions in question were part of a single proceeding, even under the Second Circuit's analysis. Moreover, we find that the fact the State instituted and proceeded with the forfeiture action against defendant before it knew the outcome of the criminal proceedings is also not outcome determinative. (See *McCaslin*, 863 F.Supp. at 1305 (asserting that the prosecutor's state of mind cannot determine whether a defendant has been placed in double jeopardy).) Based on the foregoing discussion, we conclude that the forfeiture proceeding was separate from the criminal proceeding and not part of a single, coordinated procedure. See *1979 Cadillac Deville*, 632 So.2d at 1229; *Oakes*, 872 F.Supp. at 824-25.

Because we have found double jeopardy applies in Kimery's case, we hold that further prosecution of Kimery following the forfeiture of his vehicle was prohibited by the double jeopardy clause.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the appellate court in Turner's case, cause No. 78944, and remand to the circuit court for further proceedings consistent with this opinion. We also reverse the judgment of the appellate court in cause No. 78910 with

respect to P.S. and remand to the circuit court for further proceedings consistent with this opinion. With respect to Kimery in cause No. 78910, we affirm the judgment of the appellate court.

No. 78910-Appellate court judgment affirmed in part and reversed in part; cause remanded.

No. 78944-Appellate court judgment reversed; cause remanded.

JUSTICE HARRISON took no part in the consideration or decision of this case.

APPENDIX B

269 Ill.App.3d 907, 207 Ill.Dec. 279

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
George TOWNS, Defendant-Appellant.
The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Roderick TURNER, Defendant-Appellant.

Nos. 2-93-1376, 2-94-0111.
Appellate Court of Illinois,
Second District.

Feb. 24, 1995.

Justice BOWMAN delivered the opinion of the court:

The above-titled cases have been consolidated for decision, each having raised a double jeopardy issue premised on similar facts and circumstances. Both appeals are taken pursuant to Supreme Court Rule 604(f), which permits the appeal to the appellate court of the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy. 145 Ill. 2d R. 604(f).

The substantive facts in both cases are undisputed. In case No. 2-94-0111, defendant Roderick Turner was charged by grand jury indictment on January 5, 1993, with unlawful possession of a controlled substance (720 ILCS 570/402(a)(2) (West 1992)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2) (West 1992)), and unlawful possession of a controlled substance without a tax stamp (35 ILCS 520/10 (West 1992)). At the time of Turner's arrest on

these charges, the State seized $2,165 in cash. The State then sought forfeiture of this sum under the Illinois Controlled Substances Act (Controlled Substances Act) (720 ILCS 570/505 (West 1992)) and the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (725 ILCS 150/1 *et seq.* (West 1992)). Turner filed a claim contesting the forfeiture and, on August 20, 1993, a hearing was held. Following the hearing, the court ordered the cash forfeited. No appeal was taken from the forfeiture.

Following the forfeiture, Turner moved to dismiss the criminal case on grounds of double jeopardy. (725 ILCS 5/114-1(a)(2) (West 1992); U.S. Const., amend. V; Ill. Const. 1970, art. I, §10.) The motion alleged that the asset forfeiture constituted punishment for double jeopardy purposes and any subsequent prosecution for the same offense violated the constitutional protection against double jeopardy. The motion to dismiss was denied, and this timely appeal followed.

In case No. 2-93-1376, defendant George Towns was charged with unlawful possession of a controlled substance (720 ILCS 570/401(c)(2) (West 1992)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/402(c) (West 1992)), and unlawful possession of a controlled substance without a tax stamp (35 ILCS 520/10 (West 1992)). The State sought forfeiture of $411 in cash that was seized from Towns at the time of his arrest. Towns did not file a claim to the money, and it was ordered forfeited nonjudicially under section 6 of the Forfeiture Act (725 ILCS 150/6 (West 1992)).

The criminal case proceeded to a bench trial, and Towns was found guilty of possession of a controlled substance and not guilty of the other two charges. Prior to

sentencing, Towns, like Turner, filed a motion to dismiss on grounds of double jeopardy. (725 ILCS 5/114-1(a)(2); U.S. Const., amend. V; Ill. Const. 1970, art. I, §10.) The motion contained the same allegations as those made in Turner's motion. The trial court denied the motion to dismiss, and this timely appeal followed.

On appeal, defendants contend that a reading of the Supreme Court's recent holding in *Austin v. United States* (1993), 509 U.S. __, 125 L. Ed. 2d 488, 113 S. Ct. 2801, leads inescapably to the conclusion that asset forfeitures under the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq.* (West 1992)) constitute punishment for double jeopardy purposes. Defendants acknowledge that the Illinois Supreme Court recently confronted this issue in *People v. 1988 Mercury Cougar* (1992), 154 Ill. 2d 27, where it held that a civil forfeiture following a criminal prosecution for the same offense does not violate the double jeopardy clause. Defendants, however, maintain that because *Austin* and its progeny establish that forfeitures under a nearly identical Federal statute are punishment, *Mercury Cougar's* holding is no longer valid.

In response, the State argues that (1) *Austin* is inapplicable to the present cases because its conclusion that asset forfeitures are punishment arose in the context of an eighth amendment claim rather than a fifth amendment double jeopardy claim; and (2) even if *Austin* is applicable to the present cases, double jeopardy is not violated because the asset forfeitures and criminal charges against defendants were part of a single, coordinated prosecution. Additionally, with respect to defendant Towns, the State asserts that jeopardy never attached in the forfeiture proceeding because Towns failed to make a claim to the money which the State

sought to forfeit. As a result, the State asserts, Towns was never in jeopardy in the forfeiture case and his criminal prosecution did not violate double jeopardy.

The double jeopardy clause of the fifth amendment to the United States Constitution reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." (U.S. Const., amend. V; see also Ill. Const. 1970, art. 1, §10 ("No person shall be * * * twice put in jeopardy for the same offense").) The double jeopardy clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense when sought in separate proceedings. (See, *e.g.*, *United States v. Halper* (1989), 490 U.S. 435, 440, 104 L. Ed. 2d 487, 496, 109 S. Ct. 1892, 1897; *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072, 2076.) The third of these protections—the subject of this appeal—is deeply ingrained in the Anglo-American system of jurisprudence. (*Green v. United States* (1957), 355 U.S. 184, 187, 2 L. Ed. 2d 199, 204, 78 S. Ct. 221, 223.) "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times." *Bartkus v. Illinois* (1959), 359 U.S. 121, 151-52, 3 L. Ed. 2d 684, 706, 79 S. Ct. 676, 696 (Black, J., dissenting).

The fundamental purpose of the double jeopardy clause is to protect an accused from being forced to defend against repeated attempts to exact one or more punishments for the same offense and applies with equal force whether the first prosecution results in a conviction or an acquittal. (*Abbate v. United States* (1959), 359 U.S.

187, 198-99, 3 L. Ed. 2d 729, 736, 79 S. Ct. 666, 672-73; *United States v. $405,089.23 U.S. Currency* (9th Cir. 1994), 33 F. 3d 1210, 1215.) The underlying principle of the protection against double jeopardy is that "a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." *Abbate v. United States* (1959), 359 U.S. 187, 198-99, 3 L. Ed. 2d 729, 736, 79 S. Ct. 666, 673, quoted in *U.S. Currency*, 33 F.3d at 1215.

In the present case, to determine whether the State's attempt to prosecute criminally defendants following the forfeitures contravenes the double jeopardy clause, we consider two questions: (1) did the civil forfeiture under the Act amount to a "punishment" for double jeopardy purposes?; and (2) was there a separate prosecution in each case? The criminal prosecutions in the present cases violate the double jeopardy clause only if we answer both questions in the affirmative. See *U.S. Currency*, 33 F.3d at 1216.

In recent cases, the United States Supreme Court has determined that a civil penalty constitutes punishment for double jeopardy purposes, despite its civil label, when the sanction, as applied, serves the goals of punishment, retribution or deterrence, rather than remediation. In *United States v. Halper* (1989), 490 U.S. 437, 104 L. Ed. 2d 487, 109 S. Ct. 1892, the Supreme Court stated: "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." (Emphasis added.) *Halper*, 490 U.S. at 448, 104 L. Ed. 2d at 502, 109 S. Ct. at 1902.

The *Halper* court's conclusion that a civil sanction which serves retributive or deterrent purposes constitutes a punishment regardless of whether it also has a remedial purpose was reaffirmed in *Austin v. United States* (1993), 509 U.S. __, 125 L. Ed. 2d 488, 113 S. Ct. 2801. The issue in *Austin* was whether the excessive fines clause of the eighth amendment applied to forfeitures under 21 U.S.C. §881 (19__), the Federal controlled substance forfeiture statute (21 U.S.C.A. §881 (West 1981 & Supp. 1994)). Because the eighth amendment limits the government's power to punish, the central question before the court was whether the statutory forfeiture was punishment.

After tracing the long history of forfeitures in England and the United States, the court determined that a civil forfeiture stemming from a drug offense was a criminal punishment. The court observed that its decisions "consistently ha[ve] recognized that forfeiture serves, at least in part, to punish the owner" of the forfeited property. (*Austin*, 509 U.S. at __, 125 L. Ed. 2d at 503, 113 S. Ct. at 2810 citing *Calero-Toledo v. Pearson Yacht Leasing Co.* (1974), 416 U.S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080; *Goldsmith-Grant Co. v. United States* (1921), 254 U.S. 505, 65 L. Ed. 376, 41 S. Ct. 189; *Dobbins v. United States* (1878), 96 U.S. 395, 24 L. Ed. 637; *Peisch v. Ware* (1808), 8 U.S. (4 Cranch) 347, 2 L. Ed. 643.) The Court applied the *Halper* test of whether the statute serves at least *in part* to punish and noted that, even though it might have some remedial purpose, the statute was tied to the commission of a drug offense and focused on the culpability of the owner of the property to be forfeited. (*Austin*, 509 U.S. at __, 125 L. Ed. 2d at 503-05, 113 S. Ct. at 2810-11.) The court further noted that a forfeiture

of property is a fixed penalty which need not have any correlation to the damages suffered by society or to the costs of law enforcement. (*Austin*, 509 U.S. at __, 125 L. Ed. 2d at 505, 113 S. Ct. at 2812.) In view of the statute's objectives to deter and to punish, the court stated: "we cannot conclude that forfeiture * * * serves solely a remedial purpose" and held that forfeiture was a punishment, subject to the limitations of the eighth amendment's excessive fines clause. *Austin*, 509 U.S. at __, 125 L. Ed. 2d at 505, 113 S. Ct. at 2812.

Most recently, in *Department of Revenue v. Kurth Ranch* (1994), 511 U.S. __, 128 L. Ed. 2d 767, 114 S. Ct. 1937, the Supreme Court held that a financial exaction in the form of a tax imposed only on persons arrested for drug offenses can count as a separate jeopardy. The issue in *Kurth Ranch* was whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct violates the double jeopardy clause. Relying on *Halper* and *Austin*, the court concluded the tax in issue "possessed * * * an unmistakable punitive character" and held that it constituted punishment for purposes of the double jeopardy clause. *Kurth Ranch*, 511 U.S. at __, 128 L. Ed. 2d at 781, 114 S. Ct. at 1948.

Kurth Ranch also concluded that a financial exaction, such as a tax imposed only on persons arrested for drug offenses, can count as a separate jeopardy even where it is coordinated with a criminal prosecution. In *Kurth Ranch*, six members of the Kurth family were arrested for cultivating marijuana on their farm. The State of Montana pursued criminal charges, civil forfeiture proceedings, and a tax collection proceeding against the Kurths; additionally, there was a bankruptcy proceeding

initiated by the Kurths themselves. The Court characterized these as "four separate legal proceedings." (*Kurth Ranch*, 511 U.S. at __, 128 L. Ed. 2d at 774, 114 S. Ct. at 1942.) Although the three State-initiated proceedings were based on the same conduct, were pending at the same time, and were part of a coordinated attempt to close down the Kurths' marijuana operation, the court treated them as separate proceedings for double jeopardy purposes. Finally, the court held that the exaction of the tax after a criminal penalty had already been imposed was "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence,' " despite the fact that the proceedings were part of a single prosecutorial effort. *Kurth Ranch*, 511 U.S. at __, 128 L. Ed. 2d at 782, 114 S. Ct. at 1948.

Several Federal and State courts have now followed the Supreme Court's lead in concluding that a criminal prosecution brought separately from a civil forfeiture proceeding will be barred under the double jeopardy clause where the civil sanction is deemed to be punishment. *United States v. $405,089.23 U.S. Currency* (9th Cir. 1994), 33 F.3d 1210, is particularly instructive. There, the government brought a criminal prosecution against a number of defendants along with a separate but parallel civil forfeiture action under 21 U.S.C. §881 (19__) (21 U.S.C.A. §881 (West 1981 & Supp. 1994)). The forfeiture action was instituted on June 17, 1991, five days after a grand jury issued an indictment in the criminal case. The court then stayed the forfeiture action pending the outcome of the criminal prosecution. On March 27, 1992, the criminal case terminated with the conviction of all defendants. The district court then

granted summary judgment to the government in the forfeiture case. The defendants appealed, claiming that the civil forfeiture following their criminal convictions for the same offense violated the fifth amendment's double jeopardy clause. (*U.S. Currency*, 33 F.3d at 1214-15.) In addressing the defendants' claims, United States Court of Appeals for the Ninth Circuit considered (1) whether civil forfeiture under the Federal statutes constituted punishment; and (2) whether the civil forfeiture and criminal prosecution were separate proceedings.

The court answered the first question in the affirmative, relying on *Halper* and *Austin*. While acknowledging that *Austin* arose in the context of an eighth amendment claim, the ninth circuit stated that "the only fair reading of the Court's decision in *Austin* is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause." (*U.S. Currency*, 33 F.3d at 1219.) Because the statutes in issue served, at least in part, retributive and deterrent functions (*Halper*, 490 U.S. at 448, 104 L. Ed. 2d at 502, 109 S. Ct. at 1902), the court found the conclusion "inescapable" that civil forfeitures constitute punishment under the fifth amendment. *U.S. Currency*, 33 F.3d at 1219.

The court also concluded that the civil forfeiture and criminal prosecution were separate proceedings. In so doing, it rejected the government's argument that although the civil and criminal proceedings are technically separate, they were part of a single, coordinated prosecution and should be treated as one. The court stated:

> "We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved

> by separate judgments, constitute the same 'proceeding.' * * * We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution.' " *U.S. Currency*, 33 F.3d at 1216-17.

The conclusion of the ninth circuit in *U.S. Currency* is consistent with the decisions of the overwhelming majority of courts across the country which have confronted the issue. (See, *e.g.*, *United States v. Torres* (7th Cir. 1994), 28 F.3d 1463; *Clifft v. Indiana Department of State Revenue* (Ind. Tx. Ct. 1994), 641 N.E.2d 682 (following *Kurth Ranch*; controlled substances tax was punishment for double jeopardy purposes and could not be collected from defendant who had pleaded guilty to offense); *State v. 1979 Cadillac DeVille* (La. Ct. App. 1994), 632 So.2d 1221 (forfeiture of automobile as derivative contraband violated double jeopardy clause even though statute served some partly remedial purpose, where forfeiture proceeding was separate from criminal proceeding (dissent filed)), *writ granted* (1994), 642 So. 2d 1302; *New Mexico Taxation & Revenue Department v. Whitener* (1993), 117 N.M. 130, 869 P.2d 829 (drug tax was punishment which violated prohibition against double jeopardy where defendant had been convicted of drug offense and State failed to show tax was proportional and remedial (dissent filed)), *cert. granted* (1994), 117 N.M. 328, 871 P.2d 984; *Fant v. State* (Tex. Ct. App. 1994), 881 S.W.2d 830 (civil forfeiture was punishment even though partly remedial, barring further criminal prosecution (dissent filed), rejecting *Johnson v. State* (Tex. Ct. App. 1994), 882 S.W.2d 17, *review granted*, which held forfeiture of personal property was not overwhelmingly disproportionate penalty but instead was remedial); *State v. Clark* (1994), 124 Wash. 2d 90, 875

P.2d 613 (civil forfeiture of home and motor home was punishment under excessive fines clause but double jeopardy issue was not reached).

In view of the above-cited authorities, particularly *Halper*, *Austin*, *Kurth Ranch*, and *U.S. Currency*, we conclude that the forfeitures in the instant cases constituted punishments for double jeopardy purposes. A review of our State's Drug Asset Forfeiture Procedure Act (725 ILCS 150/1 *et seq.* (West 1992)) shows that it is patterned after 21 U.S.C. §881 (19__) and should be interpreted consistently with the Federal statute. Section 2 of the Forfeiture Act states:

> "The General Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom." 725 ILCS 150/2 (West 1992).

Like 21 U.S.C. §881 (19__), the objective of the Forfeiture Act is to deter criminal behavior, and its application is triggered by a criminal violation. Both the Federal statute and the Forfeiture Act provide defenses for innocent owners or interest holders in the property to be forfeited. (21 U.S.C.A. §881(a)(4)(C) (West 1981 & Supp. 1994); 725 ILCS 150/8 (West 1992).) The innocent owner defense operates to ensure that owners of property who lacked knowledge of the drug activity are not punished by forfeiture. (See *United States v. Certain Real Property & Premises, known as 890 Noyac Road, Noyac, N.Y.* (2d

Cir. 1991), 945 F.2d 1252; *People v. 1991 Chevrolet Camaro, VIN 1GFP23E9ML117842* (1993), 251 Ill. App. 3d 382). The presence of the innocent owner defense demonstrates the Forfeiture Act's focus on the culpability of the owner and belies the State's contention that it is unmotivated by any retributive purpose. (*U.S. Currency*, 33 F.3d at 1221; see also *Clark*, 124 Wash. 2d at ___, 875 P.2d at 616.) In fact, our supreme court has recently acknowledged the fact that the Federal drug asset forfeiture statute is "very similar" to the Forfeiture Act. (See *People ex rel. Waller v. 1989 Ford F350 Truck* (1994), 162 Ill. 2d 78, 87.) In the wake of *Austin* and *Kurth Ranch*, we believe that a forfeiture under the Forfeiture Act constitutes punishment even though it may have some remedial purposes. We are, of course, aware that our conclusion is different from that reached by the supreme court in *People v. 1988 Mercury Cougar* (1992), 154 Ill. 2d 27. That case, however, was decided before *Austin* and *Kurth Ranch*, and, in light of those decisions, we are compelled to reach the opposite conclusion.

We also believe that the forfeiture proceedings were separate from the criminal proceedings in the instant cases. Multiple punishments for the same conduct may be permissible if imposed in the same proceeding, but are barred if imposed in separate proceedings. (*Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892.) The State argues that the double jeopardy clause does not apply because the civil and criminal actions were part of a single, coordinated prosecution of defendants.

In arguing that the civil and criminal proceedings comprise a single, coordinated prosecution, the State attempts to garner support from *United States v. Millan* (2d Cir. 1993), 2 F.3d 17. There arrest warrants were

issued on July 30, 1991, for approximately 40 individuals including certain members of the Bottone family. Based on the same affidavit, seizure warrants were issued pursuant to the Federal civil forfeiture statute for assets connected to illegal drug activities. On August 14, 1991, an indictment was filed against the defendants charging them with participation in a massive narcotics distribution conspiracy. The same indictment included a criminal forfeiture count for properties alleged to be facilitators of, or proceeds from, drug activity. In the meantime, Alfred Bottone, Jr., filed an administrative claim challenging the government's seizure of certain assets, including a used car business. In response, on December 26, 1991, the government filed an *in rem* civil forfeiture suit against the used car business and its associated assets. In its complaint, the government incorporated the indictment by reference and exhibit.

On October 5, 1992, a superseding indictment charged that the Bottones had obtained property in excess of $100 million from the charged narcotics violations. On January 20, 1993, the Bottones entered into a stipulation whereby the government relinquished its claim to $101,000 in several bank accounts and other assets, to enable the Bottones to pay attorney fees. In return, the Bottones relinquished any claim to $240,000 in cash and certain other seized properties. The civil *in rem* suit was then dismissed. On February 23, 1993, just before the start of the criminal trial, the Bottones filed a motion to dismiss the superseding indictment on double jeopardy grounds, claiming that under *United States v. Halper* (1989), 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892, the settlement agreement constituted punishment within the meaning of the double jeopardy clause. The district

court denied the motion, finding that the civil and criminal proceedings constituted a single proceeding. The court of appeals affirmed, holding that the civil forfeiture suit was part of a single, coordinated prosecution of persons involved in alleged criminal activity. *Millan*, 2 F.3d 17.

The *Millan* court noted that the civil and criminal warrants were issued the same day by the same judge; the stipulation involved not only the seized property in the civil suit but also properties named in the criminal indictment; the civil complaint incorporated the criminal indictment; and the Bottones were aware of the criminal charges against them when they entered into the stipulation. (*Millan*, 2 F.3d at 19.) The court did not find dispositive the fact that the civil and criminal cases were filed separately with different docket numbers, because the court noted that under Federal procedure this was the established practice. (*Millan*, 2 F.3d at 20.) Referring to *Halper*, the court also noted that this was not a case where the government might act abusively by seeking a second punishment where it was dissatisfied with the punishment levied in the first action; rather the actions of the government were contemporaneous. *Millan*, 2 F.3d at 20.

Millan was decided before *Kurth Ranch*, whose holding casts serious doubt on its continuing validity. (See *Torres*, 28 F.3d at 1465.) Indeed, it has been conclusively rejected by the ninth circuit in *U.S. Currency* and by the seventh circuit in *Torres*, both post-*Kurth Ranch* decisions. The court in *U.S. Currency* found the position adopted by *Millan* "contradicts controlling Supreme Court precedent as well as common sense." (*U.S. Currency*, 33 F.3d at 1216.) In a similar vein, *Torres* noted

that "[c]ivil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema." *Torres*, 28 F.3d at 1465; see also *1979 Cadillac DeVille*, 632 So. 2d at 1228-29 (distinguishing *Millan* and noting the forfeiture proceeding in *Millan* was incorporated into the criminal indictment).

For the same reasons expressed by the seventh and ninth circuits, we find the State's argument based on *Millan* unpersuasive as to defendant Turner. For other reasons, discussed below, we agree with the State's contention that defendant Towns' conviction does not violate the double jeopardy clause.

As to defendant Turner, the facts indicate that the civil forfeiture and criminal case were separate proceedings. The forfeiture proceeding was complete on August 20, 1992, when, following a hearing, Judge Grometer ordered the forfeiture of $2,165 seized from Turner. The criminal indictment against Turner, based on the same conduct, was not filed until January 5, 1993, and was docketed separately and assigned to a different judge. In view of *Kurth Ranch* and *U.S. Currency*, it is clear that the forfeiture and criminal proceedings were separate. As the Court of Appeals stated in *U.S. Currency*, "[a] forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time." (Emphasis in original.) (*U.S. Currency*, 33 F.3d at 1216.) Thus, we cannot deem the civil forfeiture and criminal prosecutions in No. 2-94-0111 to be part of the same proceeding.

As to defendant Towns, we are presented with a different set of facts. On June 29, 1992, the Kane County State's Attorney sent Towns a notice of pending forfei-

ture by certified mail, in compliance with section 6 of the Forfeiture Act. (725 ILCS 150/6 (West 1992).) Towns then had 45 days from the effective date of the notice to file a verified claim with the State's Attorney, asserting his interest in the property. (725 ILCS 150/6(C)(1) (West 1992).) Towns failed to file a claim within the 45-day period, and a nonjudicial declaration of forfeiture was executed on August 17, 1992.

The State argues that Towns' failure to make a claim to the property prevented him from being made a party to the forfeiture proceeding and that, as a result, he was never in jeopardy in that proceeding. In response, Towns argues that because the property was seized from him, he had a possessory interest sufficient to place him in jeopardy in the forfeiture proceeding regardless of whether he filed a claim.

Neither party has cited, and our research has not revealed, any Illinois case addressing the effect of the failure to file a claim by the alleged owner of property which is the subject of a forfeiture. However, the seventh circuit recently confronted this question in the previously discussed case of *United States v. Torres* (7th Cir. 1994), 28 F.3d 1463. There, the property in issue was $60,000 in cash seized from Torres and another man by Federal agents in a drug arrest. Torres received notice of the impending forfeiture of the seized money but chose not to make a claim to it. The court held that Torres' failure to make a claim to the property rendered him a nonparty to the forfeiture proceeding. As a result, Torres was not in jeopardy in the forfeiture proceeding and his subsequent criminal prosecution was not barred by the double jeopardy clause. (*Torres*, 28 F.3d at 1465.) Judge Easterbrook, writing for the court, noted that "[y]ou can't have

double jeopardy without a former jeopardy" and stated: "As a non-party, Torres was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.' " *Torres*, 28 F.3d at 1465, quoting *Serfass v. United States* (1975), 420 U.S. 377, 391-92, 43 L. Ed. 2d 265, 276, 95 S. Ct. 1055, 1064.

We find the reasoning of *Torres* persuasive. Despite being given the statutorily mandated notice of the forfeiture, Towns made no claim to the money and, hence, never became a party to the proceeding. Instead of following the prescribed method for asserting his interest in the seized cash, he allowed it to be forfeited. Because he did not make himself a party to the forfeiture proceeding at the appropriate time, the forfeiture of the money "did not impose any penalty on *him* [and] * * * the argument derived from *Kurth Ranch* fails." (Emphasis in original.) (*Torres*, 28 F.3d at 1466.) We therefore find that because Towns was never in jeopardy in the forfeiture proceeding, his subsequent criminal conviction does not violate the fifth amendment.

We conclude that, since a judgment of forfeiture has been entered, further prosecution of defendant Turner is barred by the constitutional prohibition against double jeopardy. In case No. 2-94-0111, the trial court's order denying defendant Turner's motion to dismiss is vacated and the criminal charges are hereby dismissed with prejudice. In case No. 2-93-1376, the conviction of defendant Towns is affirmed for the reasons stated above.

No. 2-93-1376, Affirmed.

No. 2-94-0111, Vacated; cause dismissed.

McLAREN, P.J., and GEIGER, J., concur.

(Letterhead of)

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT

Appeal from the Circuit Court of County of Kane

Trial Court No.: 92CF2086

THE COURT HAS THIS DAY, 03/29/95, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-94-0111

People v. Turner, Roderick

Upon consideration of the Petition for Rehearing filed by plaintiff-appellee, the Petition for Rehearing is hereby denied.
(Bowman, McLaren, Geiger, JJ.)

LOREN J. STROTZ
Clerk

APPENDIX C

[Dated March 1, 1995]

Nos. 2-93-1050 & 2-93-1212, cons.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re P.S., a Minor,	)	Appeal from the Circuit Court of Kane County.
	)	
	)	No. 93-J-83
	)	
(The People of the State of Illinois, Petitioner-Appellee, v. P.S., Respondent-Appellant).	)	Honorable Richard Larson, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
	)	
Plaintiff-Appellee,	)	No. 91-CF-1649
	)	
v.	)	
	)	
JOHN KIMERY,	)	Honorable Barry Puklin, Judge, Presiding.
Defendant-Appellant.	)	

RULE 23 ORDER

The above-titled cases have been consolidated for decision, each having raised a double-jeopardy issue premised on similar facts and circumstances. The appeals are taken pursuant to Supreme Court Rule 604(f), which provides that a "defendant may appeal to the Appellate

Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy." 145 Ill. 2d R. 604(f).

In case No. 2-93-1050, *In re P.S.*, on May 4, 1991, respondent minor was charged by complaint in circuit court case No. 91-CF-663 with unlawful possession of cannabis, a Class 4 felony (720 ILCS 550/1 (West 1992)), and unlawful possession of cannabis with intent to deliver, a Class 3 felony (Ill. Rev. Stat. 1991, ch. 56 1/2, pars. 704(d), 705(d) (now 720 ILCS 550/4(d), 5(d), (West 1992))). The respondent was arrested following the execution of a search warrant on May 3, 1991, in Geneva, Illinois, which resulted in the charges and the seizure of a 1982 Cadillac Eldorado and currency in the amount of $1,627.22.

The funds became the subject of a forfeiture complaint filed by the State on September 3, 1991, and amended September 4, 1991, in circuit court case No. 91-MR-357. Respondent appeared as a claimant in the civil forfeiture proceeding prosecuted pursuant to the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (Ill.Rev.Stat. 1991, ch. 56 1/2, par. 1671, *et seq.* (now 725 ILCS 150/1 *et seq.* (now 725 ILCS 150/1 *et seq:* (West 1992))). After a bench trial before Judge James Quetsch, the funds were forfeited to the State on August 31, 1992.

On February 2, 1993, the criminal charges in case No. 91-CF-663 were ordered transferred to the juvenile court for adjudication, and a petition to find respondent delinquent based on these charges was filed on February 24, 1993, in circuit court case No. 93-J-83. Respondent filed a motion to dismiss the criminal charges on the ground of double jeopardy, arguing that he had once been punished as a result of the civil forfeiture proceeding and

could not again be placed in jeopardy for the same conduct in the juvenile proceeding. Respondent's motion was denied by Judge Richard Larson on September 1, 1993, and this appeal followed. Respondent raises the issue whether he would be impermissibly subjected to double jeopardy by the State's attempts at further prosecution. This court stayed the proceedings below pending resolution of the appeal. The juvenile delinquency proceeding will be treated as a criminal proceeding for purposes of determining the applicability of double jeopardy. (See *In re McGovern* (1978), 62 Ill. App. 3d 1049, 1052 (in drug case, court determined doctrine of double jeopardy applies to delinquency proceedings as well as to criminal proceedings).) See also 134 Ill. 2d R. 660(a) ("Appeals from final judgments in delinquent minor proceedings, except as otherwise specifically provided, shall be governed by the rules applicable to criminal cases").

In case No. 2-93-1212, *People v. Kimery*, defendant, John S. Kimery, was indicted on October 22, 1991, in criminal case No. 91-CF-1649, for unlawful possession of a controlled substance (cocaine) weighing less than 15 grams, a Class 4 felony (Jll. Rev. Stat. 1991, ch. 56 1/2, par. 1402(c) (now 720 ILCS 570/402(c) (West 1992))). The offense was alleged to have occurred on October 6, 1991, in Aurora, Illinois. On November 18, 1991, the State filed a forfeiture complaint against a 1982 Maroon Ford Mustang, VIN #1FABP1OBOCF213758, pursuant to the Forfeiture Act in circuit court case No. 91-MR-438. The complaint alleged that defendant was stopped after police observed a transaction involving defendant in Aurora on October 6, 1991. The police recovered cocaine from defendant, who had been seen driving the Mustang which was alleged to have been used to facilitate the sale, receipt,

possession, and concealment of a controlled substance. John and Steven Kimery appeared as owners-claimants in the forfeiture proceeding to seek return of the property. After a bench trial before Judge James Quetsch, the Mustang was forfeited to the State by an order dated May 26, 1992. That order was affirmed by this court in *People v. One 1982 Maroon Ford Mustang, VIN 1FABP1OBOCF213758* (1994), 258 Ill.App.3d 127.

On August 13, 1992, defendant filed a motion to dismiss the criminal charge on the ground of double jeopardy; the motion was taken under advisement. On April 12, 1993, defendant entered a guilty plea. Prior to sentencing, on July 8, 1993, defendant moved to vacate his plea and to dismiss the charge, relying in part on the United States Supreme Court's decision in *Austin v. United States* (1993), 509 U.S. ___, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (determining that a civil forfeiture may be deemed a punishment for a criminal offense under certain circumstances). Judge Barry Puklin denied defendant's motion and sentenced him to one year of imprisonment, but the court stayed the sentence pending appeal.

As a preliminary matter, we address the State's contention in the *Kimery* case that this court does not have jurisdiction to hear that appeal because defendant pleaded guilty and, following the imposition of sentence, did not file a Rule 604(d) motion to withdraw his plea and vacate the judgment as a prerequisite to the appeal. (145 Ill. 2d. R. 604(d).) Here, *prior* to sentencing, defendant renewed his motion to dismiss the cause on double jeopardy grounds, and, in the alternative, sought to stay the sentencing proceeding. The motion was denied. Defendant requested leave to file his notice of appeal, which notice, filed that same day, states that it was

brought prior to final disposition. Judge Puklin nevertheless proceeded to sentencing despite defendant's request to file his notice of appeal immediately following the denial of his motion. The court stated: "I'm going to go ahead with sentencing anyway, and no matter what I do, I'm gonna make a decision, withhold judgment, allow you to take the appeal, but I don't want this comin' back two years from now." We believe the court should have terminated the proceeding when defendant sought to file his notice of appeal.

Rule 604(f) grants defendant the right to file an interlocutory appeal from the denial of his motion to dismiss the cause on double jeopardy grounds (*People v. Franklin* (1987), 159 Ill. App. 3d 56, 60), and the rule appears to place no other temporal restrictions on the filing of a notice of appeal other than the denial of the motion to dismiss (145 Ill. 2d R. 604(f)). Defendant did not forego his right to appeal pursuant to Rule 604(f) when the court proceeded to pronounce sentence notwithstanding his request to file his notice of appeal immediately. Rule 604(d) should not be used to render nugatory defendant's right to appeal. A defendant's failure to file or renew a Rule 604(d) motion is ordinarily excused when the defendant is misled or prevented by the court from filing a proper motion. *People v. Ramage* (1992), 229 Ill. App. 3d 1027, 1031; *People v. Radunz* (1989), 180 Ill. App. 3d 734, 740.

In addition, although a double jeopardy claim can be waived, the mere entry of a guilty plea generally does not, without more, waive a claim that the State may not constitutionally prosecute the defendant on double jeopardy grounds. An admission of guilt does not waive an objection to being haled into court in the first place.

(*Menna v. New York* (1975), 423 U.S. 61, 46 L. Ed. 2d 195, 96 S. Ct. 241 (*per curiam* opinion) (and footnotes therein); see *People v. Dieterman* (1993), 243 Ill. App. 3d 838, 842-43.) The claim before the trial court and now on appeal was not whether defendant was guilty but whether he should be prosecuted and punished again for the same offense. We find that we have appellate jurisdiction, and defendant has not waived his double jeopardy claim.

As in respondent's case, defendant Kimery contends that, since a (civil) drug asset forfeiture has been deemed a criminal punishment under *Austin*, he cannot be prosecuted in a subsequent or separate criminal proceeding stemming from the same conduct which resulted in the forfeiture, because the constitutional prohibition against double jeopardy bars such multiple punishments. This issue concerns a developing area of constitutional law and is one of great importance in this jurisdiction. We thus consider cases from other jurisdictions. The weight of authority strongly supports the position taken by appellants. Based on our analysis of the current state of the law, we conclude that the prohibition against double jeopardy bars further proceedings in their respective cases. We therefore vacate the orders in question and dismiss the charging instrument with prejudice in each case.

The double jeopardy clause of the Fifth Amendment to the United States Constitution reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." (U.S. Const. amend. V; see also Ill. Const. 1970, art. I, §7 ("No person shall be *** twice put in jeopardy for the same offense").) The double jeopardy clause protects against three distinct abuses: (1) a

second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense when sought in separate proceedings. Multiple punishments may be sought in the same proceeding or trial, provided that the total punishment does not exceed that authorized by the legislature. (*United States v. Halper* (1989), 490 U.S. 435, 451, 104 L. Ed. 2d 487 ___, 109 S. Ct. 1892, 1903 (under the double jeopardy clause, defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial (*i.e.*, compensatory), but rather as a deterrent or retribution (*i.e.*, punishment)).) The third of these protections is well settled in Anglo-American jurisprudence (*Halper*, 490 U.S. at 440, 104 L. Ed. 2d at 496, 109 S. Ct. at 1897) and is the subject of this appeal.

The fundamental purpose of the double jeopardy clause is to protect an accused from being forced to defend against repeated attempts to exact one or more punishments for the same offense; that protection applies with equal force whether the first prosecution results in a conviction or an acquittal. (*United States v. $405,089.23 U.S. Currency* (9th Cir. 1994), 33 F.3d 1210, 1215.) The principle involved is that "a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." *U.S. Currency*, 33 F. 3d at 1215, quoting *Abbate v. United States* (1959), 359 U.S. 187, 3 L. Ed. 2d 729, 79 S. Ct. 666.

To determine whether the State's attempts to further prosecute respondent and defendant contravene the double jeopardy clause, we consider two questions: (1) Did the civil forfeiture under the Forfeiture Act amount to a "punishment" for double jeopardy purposes?; and (2) Was there a separate prosecution in each cause? (See *U.S. Currency*, 33 F.3d at 1216.) If the answer to either question is negative, then double jeopardy is not implicated.

In recent cases, the United States Supreme Court has determined that a civil penalty constitutes punishment for double jeopardy purposes, despite its civil label, when the sanction, as applied, serves the goals of punishment, retribution or deterrence, rather than remediation (*i.e.*, when the sanction is used to compensate or to make the government whole). In 1989, the *Halper* court stated "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." (*Halper*, 490 U.S. at 448, 104 L. Ed. 2d at 502, 109 S. Ct. at 1902 (holding disproportionate civil penalties for Medicare fraud to be punishment for double jeopardy purposes).

After tracing the history of forfeitures, in *Austin v. United States* (1993), 509 U.S. ___, 125 L. Ed. 2d 488, 113 S. Ct. 2801, the Court determined that a civil forfeiture stemming from a drug offense was a criminal punishment under the excessive fines clause of the Eighth Amendment. The Court observed that forfeiture serves, at least in part, to punish the owner and that an innocent owner defense was available. The Court applied the *Halper* test of whether the statute served at least *in part* to punish, and noted that, even though it might

have some remedial purpose, the statute focused on the culpability of the owner in tying it to a drug offense and that a forfeiture of property (as a fixed penalty) may have no correlation to any damages suffered by society or to the cost of law enforcement. In view of the statute's objectives to deter and to punish, the Court stated: "we cannot conclude that forfeiture *** serves solely a remedial purpose" and concluded that forfeiture constituted payment to a sovereign as punishment for some offense and was thus subject to the limitations of the Eighth Amendment's excessive fines clause. *Austin*, 509 U.S. at ___, 125 L. Ed. 2d at 488, 113 S. Ct. at 2812.

More recently, in *Department of Revenue of Montana v. Kurth Ranch* (1994), ___U.S.___, 128 L. Ed. 2d 767, 114 S. Ct. 1937, the Court held that a State tax imposed on the possession and storage of dangerous drugs, including harvested marijuana, was neither merely for revenue purposes nor was it remedial, but amounted to a punishment for the defendant's conduct and thus could not be collected in a separate proceeding following a criminal prosecution. In order to avoid the double jeopardy prohibition, the penalty would have had to be imposed in the criminal prosecution or not at all. In affirming without remanding to the lower court, the Supreme Court observed that the tax did not even remotely approximate the costs of law enforcement to the State (nor did State make this claim), and the tax would have been the same regardless of the amount of the State's damages.

Several Federal and State courts have not followed the Supreme Court's lead in concluding that a criminal prosecution brought separately from a civil forfeiture proceeding where the sanction is deemed to be punishment will be barred under the double jeopardy prohibition. See

U.S. Currency, 33 F. 3d at 1215 (in drug conspiracy and money laundering case, civil forfeiture of property was punishment for double jeopardy purposes where statutes did not serve solely remedial purpose and where criminal prosecution was brought at approximately the same time as a separate "parallel" civil forfeiture action); *United States v. Torres* (1994), 28 F. 3d 1463 (jeopardy attaches at beginning of forfeiture proceeding when evidence first introduced, but defendant was not a claimant protected by double jeopardy clause; criticizes *United States v. Millan* (2d Cir. 1993), 2 F. 3d 17); *United States v. McCaslin* (W.D. Wash. 1994), 863 F. Supp. 1299 (civil forfeiture of residential realty, though involving consent judgment, was punishment regardless of value of property and barred later imposition of criminal sentence even though prosecutions were close in time—regardless of the order of prosecutions; explains *Kurth Ranch*); *Clifft v. Indiana Department of State Revenue* (Ind. Tx. Ct. 1994), 641 N.E. 2d 682 (following *Kurth Ranch*; controlled substances tax was punishment for double jeopardy purposes and could not be collected from defendant who had pleaded guilty to offense); *State v. 1979 Cadillac DeVille* (La. Ct. App. 2d Cir. 1994), 632 So. 2d 1221 (forfeiture of automobile as derivative contraband violated double jeopardy clause even though statute served some partly remedial purpose, where forfeiture proceeding was separate from criminal proceeding; distinguishing *Millan* (dissent filed), *writ granted* (1994), 642 So. 2d 1302; *New Mexico Taxation & Revenue Department v. Whitener* (Ct. App. 1993), 117 N.M. 130, 869 P. 2d 829 (drug tax was punishment which violated prohibition against double jeopardy where defendant had been convicted for drug offense and State failed to show tax was proportional and remedial (dissent filed)), *cert. granted* (1994), 117 N.M.

328, 871 P. 2d 884; *Fant v. State* (Tex. App. 14 Dist. 1994), 881 S.W. 2d 830, (civil forfeiture was punishment even though partly remedial, barring further criminal prosecution (dissent filed); rejects *Johnson v. State* (Tex. App. 1st Dist. 1994), 882 S.W. 2d 17, which held forfeiture of personal property was not overwhelmingly disproportionate penalty but was remedial instead) (*review granted*); *State v. Clark* (Wash. 1994), 124 Wash. 2d 90, 875 P. 2d 613 (civil forfeiture of home and motorhome was punishment under excessive fines clause but double jeopardy issue was not reached).

In view of the above-cited authorities, particularly *Austin*, *Kurth Ranch*, and *U.S. Currency*, we similarly conclude that the forfeitures in the instant cases constituted punishments for double jeopardy purposes. A review of our State's Forfeiture Act (Ill. Rev. Stat. 1991, ch. 56 1/2, par. 1671, *et seq.* (now 725 ILCS 150/1 *et seq.* (West 1992))) shows that the Forfeiture Act intended civil forfeitures to have "a significant beneficial effect in deterring the rising incidence of abuse and trafficking" in controlled substances (Ill. Rev. Stat. 1991, ch. 56 1/2 par. 1672 (now 725 ILCS 150/2 (West 1992))), and the Forfeiture Act provides defenses for innocent owners or interest holders (Ill. Rev. Stat. 1991, ch. 56 1/2, par. 1678 (now 725 ILCS 150/8 (West 1992))). The objective of the Forfeiture Act is to deter and is triggered by a criminal violation. The intent of the Forfeiture Act is clearly to punish. The State has made no real showing here or below that the forfeitures were proportional and remedial in nature. (*Cf. Johnson*, 882 S.W. 2d 17; *Fant*, 881 S.W. 830 (dissent), interpreting *Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892.) In any case, in the wake of *Austin* and *Kurth Ranch*, we believe that a forfeiture, like those here, which is essentially a fixed penalty with-

out regard to the value of the property, constitutes punishment even though it may have remedial purposes.

We also believe that the forfeiture proceedings were separate from the criminal proceedings in each case. As we have noted, multiple punishments for the same conduct may be permissible if imposed in the same proceeding, but they are barred if imposed in separate proceedings. *Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892; *McCaslin*, 865 F. Supp. 1299.

The State argues that the double jeopardy clause does not apply because the civil and criminal actions were part of a single, coordinated prosecution of respondent and defendant, respectively. In *P.S.*, the State points out that the Cannabis Control Act provides for criminal penalties for the unlawful possession of cannabis (Ill. Rev. Stat. 1991, ch. 56 1/2, pars. 704, 705 (now 720 ILCS 550/4, 5 (West 1992))) and for a civil forfeiture of property allowed to be seized in connection with the offense (Ill. Rev. Stat. 1991, ch. 56 1/2, par. 712 (now 720 ILCS 550/12 (West 1992))). The forfeiture proceeding, however, is governed by the Forfeiture Act which is declared to be civil in nature. (Ill. Rev. Stat. 1991, ch. 56 1/2, par. 1672 *et seq.* (now 725 ILCS 150/2 *et seq.* (West 1992))). The State maintains that the actions against respondent were "simultaneous."

The chronology of events shows that respondent was arrested on May 3, 1991, and the property was seized. A criminal complaint was filed on May 4, 1991. The civil forfeiture complaint was originally filed on September 3, 1991. A judgment of forfeiture was entered on August 31, 1992. The criminal charges were transferred to the juvenile court in February 1993, and a delinquency petition was filed on February 24, 1993. A different judge

presided in each case, and the civil case was concluded separately from the criminal case. Nevertheless, the State maintains that there was one "synchronized effort" on the part of the State to obtain both the civil and criminal penalties.

In *Kimery*, defendant was indicted on October 22, 1991, for an offense alleged to have occurred on October 6, 1991. A forfeiture complaint was filed on November 18, 1991. A final judgment of forfeiture was entered on May 26, 1992, and was affirmed in this court's opinion filed February 22, 1994. (*One 1982 Maroon Ford Mustang*, 258 Ill. App. 3d 127.) A different judge presided over the criminal proceeding than the one who presided over the civil proceeding.

In arguing that the civil and criminal proceedings comprise a single, coordinated prosecution for double jeopardy purposes, the State garners some support from *United States v. Millan* (2d Cir. 1993), 2 F. 3d 17. In *Millan*, on July 30, 1991, arrest warrants were issued for over 40 individuals including the Bottones, and, based on the same affidavit, seizure warrants were issued for assets connected to the illegal drug activities. Among the assets seized under the civil warrants was the "Auction Cars" used car business. (*Millan*, 2 F. 3d at 18.) On August 14, 1991, an indictment was filed against defendants charging them, *inter alia*, with participation in a narcotics distribution conspiracy. The same indictment included a criminal forfeiture count for properties derived as the proceeds from, or used to facilitate, drug offenses. On December 26, 1991, the government also filed an *in rem* civil forfeiture suit against Auction Cars and bank accounts later claimed by one of the defendants, Alfred Bottone, Jr. In its complaint, the government incorporated the indictment by reference. *Millan*, 2 F. 3d at 18-19.

On October 5, 1992, a superseding indictment charged the Bottones with joint and several liability for the forfeitures of property obtained as a result of the narcotics violations. On January 20, 1993, the Bottones entered into a stipulation whereby the government relinquished its claim to $101,000 in several bank accounts and other assets to enable the Bottones to pay attorney fees. In return, the Bottones relinquished any claim to $240,000 in cash and certain other seized properties. The civil *in rem* suit was then dismissed. (*Millan*, 2 F. 3d at 19.) On February 23, 1993, the Bottones filed a motion to dismiss the superseding indictment on double jeopardy grounds, claiming that under *Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892, the settlement agreement constituted punishment within the meaning of the double jeopardy clause. The trial court denied the motion, finding that the civil and criminal proceedings constituted a single proceeding. The circuit court of appeals affirmed, holding that the civil forfeiture suit was part of a single, coordinated prosecution of persons involved in alleged criminal activity. (*Millan*, 2 F. 3d 17.) Accord *United States v. One Single Family Residence* (11th. Cir. 1994), 13 F. 3d 1493.

The *Millan* court noted that the civil and criminal warrants were issued the same day by the same judge; the stipulation involved not only the seized property in the civil suit but also properties named in the criminal indictment; the civil complaint incorporated the criminal indictment; and the Bottones were aware of the criminal charges against them when they entered into the stipulation. (*Millan*, 2 F. 3d at 19.) The court did not find dispositive that the civil and criminal cases were filed separately with different docket numbers, because under Fed-

eral procedure, this was the established practice. (*Millan*, 2 F. 3d at 20.

Relying in part on *Millan* without much elaboration, the court in *Family Residence* found that the double jeopardy protection was not implicated where the government pursued simultaneous criminal and civil sanctions against the defendant within a single, coordinated prosecution. (*Family Residence*, 13 F. 3d at 1499.) The government filed an *in rem* civil forfeiture on October 11, 1990, against defendant's residence following a search and seizure of the residence for evidence of illegal gambling activities on October 10, 1990, and criminally indicted defendants on March 26, 1991. The court found that the circumstances of the simultaneous pursuit by the government of both criminal and civil sanctions fell within the contours of "a single, coordinated prosecution." *Family Residence*, 13 F. 3d at 1499.

Both *Millan* and *Family Residence* have been rejected in *United States v. Torres* (1994), 28 F. 3d 1463, 1465 ("Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema"); and *U.S. Currency*, 33 F. 3d at 1216 (the *Millan* and *Family Residence* decisions contradict Supreme Court precedent as well as common sense; "We fail to see how two separate actions, one civil and one criminal, tried at different times before different factfinders *** resolved by separate judgments, constitute the same 'proceeding' "). See also *1979 Cadillac DeVille*, 632 So. 3d at 1228-29 (distinguishing *Millan* and noting the forfeiture proceeding in *Millan* was incorporated into the criminal indictment).

We do not find *Millan* and *Family Residence* persuasive or applicable. Here, in each case, the proceedings

were docketed separately, were instituted before separate judges, and judgments were entered separately. We cannot deem them parts of a single, coordinated prosecution. The State can avoid this type of double jeopardy problem by choosing its remedy or by employing a mechanism to bring the actions together in the same proceeding. "It is entirely reasonable to put the government to this choice." *U.S. Currency*, 33 F. 3d at 1222.

Support for the above conclusions can be found in a recent opinion issued by this court. (*People* v. *Towns* (2nd Dist. February ___, 1995), No. 2-93-1376, slip op. at 13.) In similar circumstances and utilizing a similar analysis, this court found a civil forfeiture to be punishment for purposes of the double jeopardy clause of the United States Constitution. (*Towns*, No. 2-93-1376, slip op. at 13.) This court further concluded that the civil forfeiture action and the criminal action, filed on separate dates and assigned to separate judges, were not part of a single coordinated prosecution, and therefore, the subsequent criminal prosecution was barred by the double jeopardy clause. *Towns*, No. 2-93-1376, slip op. at 18-19.

We conclude that, in each case, since a judgment of forfeiture has been entered, further prosecution is barred by the constitutional prohibition against double jeopardy. In case No. 2-93-1050, *In re P.S.*, the delinquency petition is hereby dismissed with prejudice. In case No. 2-93-1212, *People v. Kimery*, the conviction and sentence are vacated and the criminal charges are hereby dismissed with prejudice.

No. 2-93-1050, vacated; cause dismissed.

No. 2-93-1212, vacated; cause dismissed.

INGLIS, J., with GEIGER and THOMAS, JJ., concurring.